IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, **3:18-cr-00499-BR**

Plaintiff, **OPINION AND ORDER**

v.

EMANUEL DANTE HALL,

Defendant.

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BROWN, Senior Judge.

This matter comes before the Court on remand from the Ninth Circuit for the Court to reassess Defendant Emanuel Dante Hall's Motion (#78) to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) under the standard set out in *United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021). The Court concludes the record is sufficiently developed, and, therefore, oral argument would not be helpful to the Court's reassessment. For the reasons that follow, the Court **DENIES** Defendant's Motion.

BACKGROUND

On October 17, 2018, Defendant was charged with one count of Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). The Indictment alleged on September 30, 2018, Defendant "did knowingly and unlawfully possess" a firearm and had been convicted of the following crimes punishable by imprisonment for a term exceeding one year: (1) Unlawful Use of a Weapon in November 2013, (2) Felon in Possession of a Firearm in September 2012, (3) Riot in September 2008, and (4) Felon in Possession of a Firearm in 2007. On June 26, 2019, Defendant pled guilty to the charge of Felon in Possession pursuant to a Plea Agreement. On November 18, 2019, the Court sentenced Defendant to a prison term of 60 months imprisonment and to three years of supervised release.

On October 2, 2020, Defendant filed a Motion (#78) to Reduce Sentence Pursuant to 18 U.S.C. § 3583(c)(1)(A)(i).

On December 15, 2020, the Court issued an Opinion and Order denying Defendant's Motion to Reduce Sentence.

On January 7, 2021, Defendant appealed the Court's December 15, 2020, Opinion and Order.

On April 8, 2021, the Ninth Circuit issued *Aruda*, in which it clarified certain standards that apply when evaluating motions for compassionate release. The government moved to remand the matter to this Court to permit the Court to evaluate Defendant's Motion to Reduce Sentence under the standard clarified in *Aruda*.

On July 22, 2021, the Ninth Circuit remanded the matter to this Court to reassess Defendant Motion to Reduce Sentence under the standard set out in *Aruda*.

On September 15, 2021, Defendant filed a Supplemental Memorandum in Support of his Motion to Reduce Sentence. The government filed a Response to Defendant's Supplemental Memorandum on October 1, 2021. Defendant filed a Supplemental Reply on November 9, 2021, and the Court took the matter under advisement on that date.

DISCUSSION

Defendant has 17 months left on his 60-month sentence. Defendant moves for an order reducing his sentence to time served

and amending the conditions of his supervised release to include a period of community confinement at a residential reentry center or at a "probation-approved residence" pursuant to § 3582(c)(1)(A)(i) on the ground that he suffers from a number of underlying conditions "that increase his risk of serious illness from COVID-19."

I. FSA Compassionate Release Standards

"'[A] judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 560 U.S. 817, 824–25 (2010)(quoting 18 U.S.C. § 3582(b)). Compassionate release is an exception in extraordinary cases.

"For over thirty years, under the original statute, only the BOP Director could file a § 3582(c)(1)(A) motion for a sentence reduction on a defendant's behalf. However, as part of the First Step Act of 2018, [FSA] Congress amended § 3582(c)(1)(A) to allow a defendant to seek a reduction directly from the court." *United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021). Specifically, the FSA amended 18 U.S.C. § 3582(c)(1)(A) to provide:

> [T]he court . . . *upon motion of the defendant* after the defendant has fully exhausted all administrative [remedies] or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier may reduce the term of imprisonment . . . after

> considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that–
>
> (i) extraordinary and compelling reasons warrant such a reduction
>
> * * *
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

FSA, 132 Stat. 5194, Pub. L. No. 115-391 (2018)(emphasis added).

Congress, however, did not provide any "statutory definition of 'extraordinary and compelling reasons.' Instead, Congress stated . . . the Sentencing Commission, 'in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction.'" *Aruda*, 993 F.3d at 800.

Application Note 1 to United States Sentencing Guidelines (U.S.S.G.) § 1B1.13 sets out the Sentencing Commission's policy statement regarding "[r]eduction[s] in [t]erm[s] of [i]mprisonment Under 18 U.S.C. § 3582(c)(1)(A)" as follows:

> 1. Extraordinary and Compelling Reasons.- . . . extraordinary and compelling reasons exist under any of the circumstances set forth below:
>
> (A) Medical Condition of the Defendant.--
>
> * * *
>
> (ii) The defendant is--

> (I) suffering from a serious physical or medical condition,
>
> * * *
>
> that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he . . . is not expected to recover.

That policy statement also requires the court to consider whether the defendant is "a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)" when a defendant satisfies the requirements of § 1B1.13(1). U.S.S.G. § 1B1.13(2). The Sentencing Commission, however, "has not updated § 1B1.13 since the [FSA] amended § 3582(c)(1)(A). The current version of § 1B1.13 refers only to motions filed by the BOP Director, and does not reference motions filed by a defendant as now allowed under § 3582(c)(1)(A)." *Aruda*, 993 F.3d at 800.

After the FSA amended § 3582(c)(1)(A) district courts across the country were split on whether § 1B1.13(1) was an "applicable policy statement[] issued by the Sentencing Commission" as to motions for compassionate release filed by defendants rather than by the BOP. The Ninth Circuit addressed this split in *Aruda* noting:

> (1) the text of § 3582(c)(1)(A) . . . only requires courts to consider "applicable" policy statements by the Sentencing Commission; (2) the text of U.S.S.G. § 1B1.13, . . . begins "[u]pon motion of the Director of the Bureau of Prisons"; (3) the text of Application Note 4 to § 1B1.13, . . . states . . . "[a] reduction under this

> policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A)"; (4) the text of Application Note 1(D) to § 1B1.13 . . . is a catch-all provision allowing only the "Director of the Bureau of Prisons" to determine "other" extraordinary and compelling reasons; and (5) the legislative history of the First Step Act's compassionate-release amendment . . . sought to expand and expedite compassionate-release motions because they had seldom been brought by the BOP.

Aruda, 993 F.3d at 801 (citations omitted). Ultimately the Ninth Circuit concluded "the Sentencing Commission has not yet issued a policy statement applicable to § 3582(c)(1)(A) motions filed by a defendant," and, therefore, "the current version of U.S.S.G. § 1B1.13 is not an 'applicable policy statement[ ]' for 18 U.S.C. § 3582(c)(1)(A) motions filed by a defendant." *Id.* The Ninth Circuit, however, also concluded the "Sentencing Commission's statements in U.S.S.G. § 1B1.13 may inform a district court's discretion for § 3582(c)(1)(A) motions filed by a defendant, but they are not binding." *Id.* (citing *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020)). Pursuant to *Aruda,* therefore, the policy statement in U.S.S.G. § 1B1.13 is merely advisory rather than mandatory in the context of motions for compassionate release brought pursuant to § 3582(c)(1)(A) by defendants rather than by the BOP. Accordingly, this Court may only consider the criteria set out in § 1B1.13 as advisory when evaluating Defendant's Motion for Compassionate Release.

In its December 15, 2020, Opinion and Order the Court

considered the policy statement in U.S.S.G. § 1B1.13 to be mandatory rather than advisory in the context of motions for compassionate release brought pursuant to § 3582(c)(1)(A) by defendants, the Court, therefore, must reevaluate Defendant's Motion to Reduce Sentence under the appropriate standard.

II. Defendant's Medical Condition

In his Motion to Reduce Sentence Defendant asserted he has a serious medical condition within the meaning of U.S.S.G. § 1B1.13. Specifically, Defendant noted there had been confirmed cases of COVID-19 at FCI Sheridan. Defendant asserted although he is only 32 years old, he "falls into the category of inmates who are at heightened risk of serious illness from COVID-19" due to his serious health conditions that include "coronary artery disease, obesity, hypertension, and latent tuberculosis." Def.'s Mot. to Reduce Sentence at 4.

In its Response to Defendant's Motion to Reduce Sentence the government did not dispute there had been confirmed cases of COVID-19 at FCI Sheridan or that Defendant "is afflicted with health conditions which could render him at greater risk for illness were he to contract COVID-19." Gov't Resp. at 4. In fact, the government stated if Defendant's health conditions "were the Court's only consideration, [D]efendant's prior release request and health conditions could warrant a reduction in his sentence." *Id.*

On that record the Court concluded in its December 15, 2020, Opinion and Order that Defendant established he was "suffering from a serious physical or medical condition . . . that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he . . . is not expected to recover" and, therefore, that he had a serious medical condition within the meaning of U.S.S.G. § 1B1.13.

In Defendant's Supplemental Motion filed after the Ninth Circuit's remand he notes his health has deteriorated since the court issued its December 15, 2020, Opinion and Order. Specifically, Defendant notes his body mass index (BMI) has increased from 33.1 to 44.1 and he is now prediabetic in addition to his other health conditions.

The government acknowledges Defendant's weight gain and prediabetic condition, but notes Defendant is young and has been fully vaccinated against COVID-19, and, therefore, Defendant cannot satisfy the extraordinary and compelling standard.

Although the Ninth Circuit has not addressed whether an individual who has health conditions like those suffered by Defendant and who is fully vaccinated against COVID-19 can satisfy the extraordinary and compelling standard, this Court has previously concluded such an inmate cannot satisfy that standard. *See United States v. Gomez*, No. 3:09-CR-00243-BR, 2021 WL

3141506, at *5 (D. Or. July 26, 2021)("[T]he Court concludes Defendant has not satisfied the extraordinary and compelling standard because he is fully vaccinated against COVID-19, which 'minimizes any increased risk he face[s] due to his medical conditions.'"); *United States v. Wills*, No. 3:15-CR-00465-BR, 2021 WL 2179256, at *4 (D. Or. May 27, 2021)("[T]he Court concludes Defendant has not satisfied the extraordinary and compelling standard because he is fully vaccinated against COVID-19."). Other district courts in the Ninth Circuit and other judges in this District have also concluded inmates who have been fully vaccinated and who suffer from conditions similar to those of Defendant have not satisfied the extraordinary and compelling standard. *See, e.g., United States v. Prince*, No. 3:18-CR-00616-MO-1, 2021 WL 2903222, at *1 (D. Or. July 8, 2021)(denying the defendant's motion for compassionate release on the ground that although the defendant suffers from serious medical conditions, he is fully vaccinated against COVID-19); *United States v. Cardoza*, No. 3:17-CR-00438-JO, 2021 WL 932017, at *1 (D. Or. Mar. 11, 2021)(concluding the defendant, who was obese and suffered from asthma, "has not proven 'extraordinary and compelling reasons' justifying his release pursuant to 18 U.S.C. § 3582(c)(1)(A)" based on his "vaccination and the low rate of infection at FCI Terminal Island"); *United States v. Pena*, No. CR1900296001PHXDJH, 2021 WL 1688240, at *1 (D. Ariz.

Apr. 28, 2021)("[T]he Government notes [Defendant] received both doses of the COVID-19 vaccine. The Government contends this is an additional basis to deny her current Motion [for Compassionate Release]. The Court agrees."); *United States v. Sakuma*, No. CR 12-00055 JMS, 2021 WL 1536571, at *3 (D. Haw. Apr. 19, 2021) ("[T]aking into account Defendant's age [58], risk factors [diabetes, high blood pressure, and high cholesterol], and that he has been vaccinated, the court concludes that [Defendant] has failed to demonstrate that extraordinary and compelling reasons warrant compassionate release."); *United States v. Martinez*, No. 19-CR-5218-MMA, 2021 WL 927360, at *3 (S.D. Cal. Mar. 10, 2021)(Even though the defendant suffered from obesity and high blood pressure, the court denied the defendant's motion for compassionate release because the defendant had been fully vaccinated against COVID-19.); *United States v. Grummer*, No. 08-CR-4402-DMS, 2021 WL 568782, at *2 (S.D. Cal. Feb. 16, 2021)("Although Defendant suffers from several chronic medical conditions, his vaccination significantly mitigates the risk that he will contract COVID-19."); *United States v. Ballenger*, No. CR16-5535 BHS, 2021 WL 308814, at *4 (W.D. Wash. Jan. 29, 2021)(denying the defendant's motion for compassionate release because "[a]lthough it is currently unknown how long immunity produced by vaccination lasts, based on evidence from clinic trials, the Pfizer-BioNTECH vaccine [that defendant] received was

95% effective at preventing COVID-19 illness. The defendant has the burden to establish his entitlement to compassionate release. He has not met that burden.").

In addition, district courts in the Ninth Circuit and other judges in this District have concluded inmates who are fully vaccinated against COVID do not satisfy the extraordinary or compelling standard even in light of the emergence of the delta variant. *See, e.g., United States v. Gentry*, No. 3:08-CR-00140-JO, 2021 WL 4499035, at *2 (D. Or. Oct. 1, 2021)(denying motion for compassionate release of fully-vaccinated inmate after considering delta variant); *United States v. Graham*, No. 3:12-CR-00178-MO-1, 2021 WL 4722000, at *1 (D. Or. Aug. 24, 2021) (same); *United States v. Capito*, No. CR-1008050001PCTMTL, 2021 WL 4552954, at *4 (D. Ariz. Oct. 5, 2021)(concluding "defendant's receipt of the COVID-19 vaccine weighs against granting compassionate release" even after considering the delta variant); *United States v. Mohamud*, No. 10CR4246 JM, 2021 WL 4460705, at *4 (S.D. Cal. Sept. 29, 2021)(same); *United States v. Finazzo*, No. CR 11-00383 LEK, 2021 WL 4391256, at *3 (D. Haw. Sept. 24, 2021) (same).

The Court finds these cases to be persuasive and adopts their reasoning. Accordingly, on this record the Court concludes Defendant has not satisfied the extraordinary and compelling standard because he is fully vaccinated against COVID-19, which

minimizes any increased risk he faces due to his medical conditions.

IV. Danger to Society

In his Supplemental Memorandum in Support of his Motion to Reduce Sentence Defendant continues to assert he would not be a danger to the community if he was released because he has not had any disciplinary infractions during his present term of incarceration; he has earned all credit available for good conduct; and he has completed numerous educational and rehabilitative programs, including wellness, communication, math, and six levels of anger management. Defendant also notes he suffered a shattered left femur from gunshot and had metal rods inserted from his knee to his hip. Defendant's injury did not heal properly, and he had "delayed union of the fracture and shrapnel remaining in the wound." Def.'s Mot. at 3. As a result, Defendant was wheelchair bound until November 2019. Defendant now walks with a cane and experiences severe pain when he stands or walks. Defendant asserts his limited mobility greatly reduces his ability to commit further crimes.

The government continues to assert Defendant would present a danger to the safety of any other person or to the community if he was released.

In the December 15, 2020, Opinion and Order the Court considered the § 3142(g) factors when determining whether

Defendant was a danger. The Court concluded the facts underlying Defendant's crime of conviction, Defendant's considerable history of possessing firearms, committing firearms-based felonies, and reoffending when released from custody indicated Defendant would continue to be a danger if he was released. The Court also concluded Defendant's gun-shot injury, though severe, did not indicate Defendant was not likely to be a danger if he was released.

Considering the § 1B1.13 criteria set out as advisory rather than mandatory as directed in *Aruda*, the Court concludes the record does not reflect that Defendant would not be a continuing danger to society if he is released to community confinement.

Accordingly, in the exercise of its discretion, the Court **DENIES** Defendant's Motion to Reduce Sentence because Defendant has not established he suffers from a sufficiently serious medical condition and the record does not reflect that Defendant would not be a continuing danger to society if he is released to community confinement.

CONCLUSION

For these reasons, the Court **DENIES** Defendant's Motion (#78)

to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

IT IS SO ORDERED.

DATED this 29th day of November, 2021.

/s/ Anna J. Brown

ANNA J. BROWN
United States Senior District Judge